(2)

No. 91-828

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

DAN VANDENBERG,
Petitioner,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
and VICTOR KIMURA,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal for the State of California Sixth Appellate District

RESPONDENT VICTOR KIMURA'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The California Court of Appeal for the Sixth District issued a writ of mandate holding, under state law and under federal constitutional law, that a letter written by defendant Victor Kimura in the course of a heated university debate was not actionable defamation. The court of appeal concluded, in an unpublished decision, that no reasonable reader could take the criticisms in the letter for factual accusations and that the audience to which it was circulated could not reasonably believe that it implied or was based on undisclosed factual accusations. The federal questions presented are:

(1) Whether review is appropriate when the state appellate court decision was based on independent and adequate state grounds.

(2) Whether the court below applied the correct legal test when, relying on *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 879 (1990), it held that Victor Kimura's December 12, 1988, letter was protected expression under the First Amendment of the Constitution, based on the conclusion that the letter implied no verifiable facts.

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OPINIONS BELOW

The decision of the California Supreme Court denying review and ordering decertification and withdrawal from publication of the court of appeal decision is dated August 22, 1991, and is not reported.

The opinion of the California Court of Appeal for the Sixth District is dated May 30, 1991, and has been withdrawn from publication.

The order of the Superior Court of the County of Santa Cruz denying summary judgment, dated February 13, 1991, is not reported.

The order of the Superior Court of the County of Santa Cruz granting summary judgment, dated October 8, 1991, is not reported.

The decision of the California Supreme Court, the opinion of the California court of appeal, and the order of the superior court denying summary judgment are reprinted in Petitioner VanDenBerg's appendix.

STATEMENT OF THE CASE

Victor Kimura participated in a debate within the University of California, Santa Cruz ("UCSC" or the "University") community about an official decision by the administration of one of UCSC's colleges. Kimura was one of many who believed that a well-publicized decision by Crown College raised serious issues about racial insensitivity at UCSC, and he challenged the decision in an emotional open letter to Plaintiff VanDenBerg, the administrative head of the College. VanDenBerg responded not by answering any of the criticisms, but by suing one of his critics for libel.

I. Factual Background

The claims against Kimura in this action were based on a single letter that he wrote to comment on a controversy on the

campus and in the University community.[1] Plaintiff VanDenBerg was the Bursar, or chief administrative officer, of Crown College, the largest of the colleges that make up the University. (Pet. App. A-4; Defendants' Joint Separate Statement of Issues as to Which There is No Substantial Controversy, Associated Facts and Reference to Supporting Evidence ("Undisp. Facts") Nos. 53-56; Deposition of Don VanDenBerg ("VDB Dep.") 34:1-2; 12:6-8.)[2] Kimura was employed at the University as Budget Director. (Pet. App. A-4.) On December 7, 1988, Crown College refused to participate in a "College Night" celebrating Filipino culture. (Pet. App. A-4 to A-5.) Crown's staff decided, with Plaintiff's approval, that Crown would reject any kind of "Asian" theme or menu because December 7 is the anniversary of the Japanese attack on Pearl Harbor on December 7, 1941. (Undisp. Facts Nos. 12-17.) Plaintiff, as bursar, was responsible for planning and supervising all of Crown's public events, including "College Nights," regular cultural events held on the first Wednesday of each month during the academic term. (Pet. App. A-5;

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[1] Plaintiff VanDenBerg's purported "Factual Background" makes no citations to the record and contains statements that are outside everything in the trial court record and contrary to the court of appeal's "state[ment of] the record in accordance with the principles governing motions for summary judgment, which are that the evidence is viewed in the light most favorable to the party resisting the motion, with all inferences made and ambiguities resolved in his favor." (*See* Petitioner's Appendix (hereinafter "Pet. App.") A-4 to A-6.) Plaintiff did not challenge the court of appeal's statement of the record in a petition to the court of appeal or to the California Supreme Court. Nor does plaintiff purport to ask this Court to second-guess the court of appeal's statement of the record.

[2] All of the "Undisputed Facts" cited in this opposition to the petition for certiorari were conceded by plaintiff VanDenBerg as undisputed in Plaintiff's Response to Defendants' Joint Statement of Undisputed Facts.

Undisp. Facts Nos. 6, 60-61; Deposition of Morgan W. Snow 33:3-4.)

Following the refusal of Crown College to participate in the Filipino event, a large number of students, staff, and faculty expressed public concern about the racial implications of Crown College's decision to reject the Filipino theme because of the Pearl Harbor anniversary. (Pet. App. A-5; VDB Dep. Exhs. 10, 12, 29, 31, 35, 37, 52, 59.) Articles and posters appeared condemning the decision as "bigoted" and "insensitive." (VDB Dep. Exhs. 3, 10, 12.) Meetings were held in which Asian students expressed their belief that they were being "punished" by Crown College, based on association of Asian ethnic groups with the Japanese attack on Pearl Harbor. (Deposition of Shawn Ogimachi at 21:2-8; 25:19-26:10; Deposition of John W. Isbister at 84:18-85:1.)

UCSC Budget Director Victor Kimura, a Japanese American who was born in an American internment camp during World War II, was deeply offended by the actions of administrators at Crown College, including Bursar VanDenBerg. In the course of the heated University debate about the College Night decision, Kimura drafted an open letter to VanDenBerg criticizing Crown's decision. In the letter, dated December 12, 1988, Kimura expressed his belief that the rejection of a Filipino theme by Crown wrongly implicated Filipino and other Asian-American students in the Pearl Harbor attack. Kimura attempted to "add [his] criticism" to the ongoing debate, describing the Crown administrators who cancelled the Filipino event as "perfect examples of what enlightened people of all ethnic and cultural backgrounds define as 'racist' and 'bigoted.'" (Pet. App. A-23.)

On December 21, 1988, the Chancellor of UCSC issued a statement criticizing Crown's decision as an "error of judgment." (Pet App. A-5.) An official report of the decision

by Vice Chancellor Bruce Moore concluded that Crown's administrators showed "'insensitivity' and [were] oblivious to the fact that many outside the University would view the linkage between Asian Food and World War II as institutional racism." (Pet. App. A-5 to A-6.) VanDenBerg took a leave of absence from the University and brought this action for money damages against the University Regents, Chancellor Stevens, and Kimura.

II. Procedural History

Kimura and the Regents of the University of California moved for summary judgment on November 27, 1990, on the grounds that the December 12, 1988, letter is not actionable defamation under state law, that it is protected expression under *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 2695 (1990), and that Bursar VanDenBerg is a public official or public figure and cannot show by clear and convincing evidence that Kimura acted with actual malice, under *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964). The superior court granted summary adjudication on the public official issue, holding that Bursar VanDenBerg is a public official, but denied summary judgment on all other grounds. (Pet. App. A-20 to A-21.)

Kimura, joined by the Regents of the University of California, petitioned for a stay and a writ of mandate on March 4, 1991. The petition was granted on May 30, 1991. The decision by the court of appeal began by expressly distinguishing between the state law issue of whether a cause of action had been stated for defamation and the federal question of whether Kimura's speech was protected by the First Amendment. *See infra* Reasons Why The Petition Should Be Denied, at I. The court then ruled in Defendents' favor on *both* grounds. First the court held, as a matter of state law, that the letter did not allege or imply defamatory facts. (Pet. App.

A-6, A-18.) Second, and independently, the court held that the letter was protected expression under this Court's decision in *Milkovich*, stating that the governing test is "whether particular statements can reasonably be interpreted as stating actual defamatory facts about an individual." (Pet. App. A-8, A-18.) Specifically, the court found that the issues raised in the December 12, 1988, letter were "clearly matter of public concern." (Pet. App. A-11.) The court held that the audience to which the letter was addressed and circulated "would not reasonably believe that it implied or was based on undisclosed factual accusations." (Pet. App. A-17.) The court also emphasized that the criticisms stated in the letter were "imprecise and difficult if not impossible to verify" and "part of the rhetoric generated on an explosive topic of public concern." (Pet. App. A-18.)[3]

The court then determined that no reasonable reader would understand Kimura's letter as a factual accusation and, based on this determination, held that the letter was not actionable under California law or federal constitutional law: "We conclude that it is not an actionable defamation and that it is constitutionally protected expression." (Pet. App. A-18.) Accordingly, the court issued a writ of mandate directing the superior court to grant summary judgment for Defendants on the cause of action for defamation.

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[3] On the ground of mootness, the court of appeal did not reach the issues raised in the petition for writ of mandate concerning Bursar VanDenBerg's public official status and whether he could, as a matter of law, prove actual malice by clear and convincing evidence. (Pet. App. A-3.) The court of appeal ordered the decision that Bursar VanDenBerg is a public official vacated based on a change in California procedural law subsequent to the hearing on the motion, which precludes summary adjudication of issues that do not completely dispose of an action or defense. (Pet. App. A-3.)

The California Supreme Court denied review of the decision, and ordered that it be decertified, on August 22, 1991.[4] On October 8, 1991, the superior court issued an order granting summary judgment on the defamation claim.

REASONS WHY THE PETITION SHOULD BE DENIED

Review by this Court is reserved for those few cases in which it is necessary to secure uniformity of decision or to settle an important question of federal or constitutional law. Rules of the Supreme Court, Rule 17. This case does not warrant review on either ground.

First, the California court of appeal decided this case on independent and adequate state law grounds, as well as under the First Amendment. Certiorari is therefore not warranted.

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[4] Cal. Rules of Court, Rule 976(c)(2) (1991) (providing that an opinion certified for publication by a court of appeal shall not be published on an order of the California Supreme Court to that effect). The consequence of "depublication" is that the decision may not be used as precedent in any other action, although it remains law of the case. Rule 977(a) ("An opinion that is not ordered published *shall not be cited or relied on by a court or a party in any other action or proceeding . . .*") (emphasis added); Rule 977(b) (stating exception for doctrines of law of the case, *res judicata*, or collateral estoppel). An order by the California Supreme Court ordering depublication of an opinion "shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion." Rule 979(e); *see also* Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. L. Rev. 514 (1984).

California v. Freeman, 488 U.S. 1311, 109 S. Ct. 854 (1988).[5] Second, the court of appeal properly decided this case under the First Amendment, applying this Court's recent decision in *Milkovich* to the undisputed facts of the case. Plaintiff can point to no conflict in decisional law and no unresolved questions of constitutional law raised by this case. Consequently, certiorari is inappropriate and should be denied. Third, the decision of the court of appeal in this depublished case applies uniquely and exclusively to these parties. The decision does not appear in the official reporter, and may not be cited as precedent in any other California action. For this reason, too, it does not merit review by this Court.

I. The Court of Appeal Decided This Case on Independent and Adequate State Law Grounds

The California Court of Appeal for the Sixth District expressly states that its decision is based on separate and independent state common law grounds, as well as on the First Amendment. The court identifies two separate "analytic tasks" that it must undertake in determining whether the Kimura letter constitutes actionable defamation: (1) deciding whether the statement is sufficiently factual to be actionable, a state law determination; and (2) deciding whether it is worthy of constitutional protection. The court proceeds to accomplish both of these tasks, deciding first of all that the letter is not actionable on state law grounds.

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[5] Plaintiff's lead argument, that certiorari should be granted because the court of appeal followed federal constitutional law rather than "standing on [its] own ground," *i.e.*, following state law, is therefore meritless on its face. As shown below, the court of appeal held that the letter was not actionable defamation under state tort law as well as under federal constitutional requirements. (Pet. App. A-18); *see* discussion *infra* at I.

The opinion stresses at the outset that "the constitutional question cannot arise until it is first determined that a statement is an actionable defamation under state law." (Pet. App. A-6.) The court articulates state law as requiring that "no communication gives rise to an action for defamation unless it either alleges or implies defamatory facts." (Pet. App. A-6.) The court cites *Stevens v. Tillman*, 855 F.2d 394, 400 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065, 109 S. Ct. 1339 (1989), which held under Illinois common law that the action of calling an elementary school principal "racist" was not defamatory. *Id.* at 402. The court also cites the Restatement (Second) of Torts, Section 566 (1977), for the common law rule that a "statement in the form of an opinion . . . is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." (Pet. App. A-6. n.2.)

Although, as discussed below, the court also correctly holds that the statements in Kimura's letter are protected expression under the First Amendment, the holding of the court is equally premised on independent and adequate state law grounds. The court makes this clear when it states of the letter, "we conclude that it is not an actionable defamation *and* that it is constitutionally protected expression." (Pet. App. A-18) (emphasis added). Where a state appellate court decision is firmly grounded in state law, review is inappropriate. Thus, in *California v. Freeman*, 488 U.S. 1311, 1313, 109 S. Ct. 854, 856 (1988) (O'Connor, J., in chambers) a stay was denied where it appeared clear from the face of the California Supreme Court opinion that its analysis "constitutes an adequate and independent state ground of decision." Similarly, the decision in *Uhler v. AFL-CIO*, 468 U.S. 1310, 1311, 105 S. Ct. 5, 6 (1984) (Rehnquist, J., in chambers), stresses that the rule against reviewing state court decisions that rest on independent alternative state grounds was adopted "largely for the reason that decisions on the federal questions . . . would amount to no more than advisory opinions."

Because the court of appeal bases its holding in this case on an independent and adequate state law ground, certiorari is not appropriate.

II. The Court of Appeal's Decision Correctly Applied Clear Precedent to Undisputed Facts and Does Not Merit Review

Recognizing that the leading precedent on the constitutional question is *Milkovich*, the California Court of Appeal for the Sixth District faithfully followed this Court's analysis in that decision. *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 2695, 2707 (1990). Thus, there is no unsettled legal issue raised by this petition. At most, Plaintiff is dissatisfied with the court of appeal's application of *Milkovich* to the undisputed facts of the case. However, the way in which an appellate court applies this Court's precedents to particular facts is not an appropriate subject for review.

Applying *Milkovich*, the court of appeal properly held that the "dispositive question" under the First Amendment in a defamation action is "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." (Pet. App. A-9) (citing *Milkovich*, 110 S. Ct. at 2707). The court of appeal recognized that its task "requires accommodating the protection of free expression of ideas under the First Amendment with the common law protection afforded to an individual's reputation." (Pet. App. A-6.) The court of appeal properly concluded that a balance of those interests in this case required that Kimura's letter be entitled to full constitutional protection under *Milkovich*. (Pet. App. A-6.) *See Milkovich*, 110 S. Ct. at 2706.

As the court of appeal emphasized, First Amendment protection rests, under *Milkovich*, not on any artificial

dichotomy between "opinion" and "fact," but on a court's careful analysis, under the totality of the circumstances, of "whether particular statements can reasonably be interpreted as stating actual defamatory facts about an individual." (Pet. App. A-8.) In *Milkovich*, as an example of speech that would not be actionable, the Court referred to a statement about "'abysmal ignorance [in] accepting the teachings of Marx and Lenin.'" *Milkovich*, 110 S. Ct. at 2706. Like that statement, Kimura's references to "what enlightened people of all ethnic and cultural backgrounds define as 'racist' and 'bigoted'" and to "truly effective affirmative action," and his use of the word "punish" in quotation marks, underscore the subjective, rhetorical and nonverifiable nature of his criticisms.

California cases cited by the court of appeal, which plaintiff now questions, either applied *Milkovich* directly or were characterized as consistent with this Court's decision in *Milkovich*. Thus, for example, *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225 Cal. App. 3d 720, 724-26, 275 Cal. Rptr. 494, 496-98 (1990), expressly applied *Milkovich* to the facts in the case and concluded that a student's accusation that his teacher was a "babbler" was nonactionable. Similarly, *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260, 721 P.2d 87, 90, 228 Cal. Rptr. 206, 209 (1986), *cert. denied*, 479 U.S. 1032, 107 S. Ct. 880 (1987), applied a "totality of the circumstances" test, consistent with *Milkovich*, for determining what is defamatory and what is rhetorical hyperbole. Indeed, the California Supreme Court's decision in *Baker* was recently cited with approval by this Court in *Masson v. New Yorker Magazine, Inc.*, ___ U.S. ___, 111 S. Ct. 2419, 2430 (1991).

The court of appeal stressed the undisputed fact that Kimura's letter was written in the context of a heated University-wide debate over the moral and political implications of the refusal by plaintiff, the highest staff official at Crown College, to permit a planned celebration of Filipino

culture on December 7, 1988, because of the Pearl Harbor anniversary. (Pet. App. A-4 to A-6.) The court of appeal correctly held that discussion of important public issues, like the one presented by plaintiff's decision, "implicates constitutional values." (Pet. App. A-12.) This is particularly true, as the court below noted, in a university setting, "in which the need for free discussion and airing of matters of concern is great." (Pet. App. A-11.) Thus, the court of appeal cited the California Supreme Court's decision in *White v. Davis*, 13 Cal. 3d 757, 770, 533 P.2d 222, 231, 120 Cal. Rptr. 94, 103 (1975), which refers to the university campus as "the sacred ground of free discussion." (Pet. App. A-11.)

As the court of appeal also held, Kimura's letter was nonactionable because "the audience to which it was addressed and circulated would not reasonably believe that it implied or was based on undisclosed factual accusations."[6] (Pet. App. A-17.) The court of appeal based its conclusion on the impossibility of verifying the "imprecise and exaggerated" opinions expressed about plaintiff, as well as "the emotional

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[6] The court of appeal also rejected Plaintiff's attempt to analogize his case to *Slaughter v. Friedman*, 32 Cal. 3d 149, 185 Cal. Rptr. 244, 649 P.2d 886 (1982), cited in his petition to this Court at 13 and 14 n.8. As the court of appeal stressed, Plaintiff's reliance on that case was misplaced: "[*Slaughter*] resolved as a matter of law whether the allegedly libelous statements could be understood by the average reader in either sense (as fact or opinion) and found a jury trial appropriate when the court had decided that the statement was indeed susceptible of either of those reasonable interpretations." (Pet. App. A-10 to A-11.) There is no such ambiguity in the present case, where the alleged libel "cannot reasonably be understood as implying any facts." (Pet. App. A-18.) Moreover, unlike the official-sounding letter in *Slaughter*, which "eschewed literary flair and rhetorical device" (*Baker*, 42 Cal. 3d at 267), Kimura's letter was highly rhetorical, relied not on official criteria but on personal anecdotes, and was written as an open letter in the course of an ongoing public debate.

and angry tone of the letter." (Pet. App. A-17.) The decision of the court of appeal is fully consistent with this Court's holding in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86, 94 S. Ct. 2770, 2781-82 (1974), that the use of the word "traitor" was not actionable because it was "merely rhetorical hyperbole." Likewise, the decision complies with *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 1542 (1970), holding that an accusation of "blackmail" was not defamatory because it was "no more than rhetorical hyperbole." The decision is also consistent with *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558 (1986), because the December 12, 1988, letter involves a statement about an issue of public concern and is not susceptible to proof as either true or false.[7] Kimura's letter also

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[7] The court of appeal cited numerous cases in support of its conclusion that terms like "racist," "bigoted," "affirmative action," and "punish" as used in Kimura's letter were too imprecise and variable in meaning to constitute actionable speech under *Milkovich*. (*See* Pet. App. A-12 to A-17, citing, *inter alia*, *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065, 109 S. Ct. 1339 (1989) ("Accusations of 'racism' no longer are obviously and naturally harmful.' The word has been watered down by overuse, becoming common coin in political discourse"); *Sall v. Barber*, 782 P.2d 1216, 1218-19 (Colo. App. 1989) (the charge "bigot," in context, was mere rhetoric); *Scelfo v. Rutgers Univ.*, 116 N.J. Super. 403, 282 A.2d 445, 449 (1971) (stressing that the epithet "Racist Pig Bastards" would not suggest to the average reader in the university community that the police were remiss in their duty, but that the author was angry, upset and resentful toward the police); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (the accusations "fascist" and "fellow traveler" were too imprecise in meaning to be defamatory), *cert. denied*, 429 U.S. 1062, 97 S. Ct. 785 (1977).) Moreover, every case that has considered terms like "racist," "bigoted," and "fascist" under the "verifiability" test required under *Milkovich* has held such accusations to be nonactionable as a matter of law, because "there

Footnote Continues ...

merits constitutional protection as part of our

> profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964).

Based on a full and careful analysis, the court of appeal concluded that Kimura's letter constituted speech protected under the First Amendment. The court of appeal decision expressly followed and correctly applied this Court's decision in *Milkovich* to the undisputed facts about the content and context of Kimura's letter. Consequently, the petition should be denied.

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are no objective criteria by which the truth or falsity of these statements can be evaluated." *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1572 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *Carto v. Buckley*, 649 F. Supp. 502, 507-10 (S.D.N.Y. 1986) (holding the accusation of "racial and religious bigotry" nonactionable); *Liberty Lobby, Inc. v. National Review*, No. 79-3445, slip op. at 10 (D.D.C. April 20, 1983) (holding the charge of "anti-Semitism" nonactionable); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 638 F. Supp. 1149, 1152 (D.D.C. 1986) (noting that the term "anti-Semitic" is "probably constitutionally protected opinion"), *aff'd*, 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825, 109 S. Ct. 75 (1988); *Holy Spirit Ass'n for the Unification of World Christianity v. Sequoia Elsevier Publishing Co.*, 75 A.D.2d 523, 524, 426 N.Y.S.2d 759, 760 (1980) (holding the phrase "Nazi-style anti-semitism" nonactionable); *Raible v. Newsweek, Inc.*, 341 F. Supp. 804, 807 (W.D. Pa. 1972) (stressing that to call a person a bigot or other name descriptive of his racial, political, religious, economic, or sociological philosophies does not give rise to a libel action).

III. Certiorari Should Be Denied Because the Decision Is Unpublished and the Holding Affects Only the Parties

Finally, the California Court of Appeals for the Sixth District's opinion is not a published decision, will not appear in the official reporter, and cannot be cited or relied on as precedent in any future California case. Cal. Rules of Court, Rule 976(c)(2), discussed *supra* at n.4. The decision will therefore affect only the parties to this action. For this reason alone, this case does not merit a grant of certiorari. As the Court stressed in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79, 75 S. Ct. 614, 619 (1954), on dismissing a writ of certiorari as improvidently granted,

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties.

(quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923)). For this reason as well, the petition should be denied.

CONCLUSION

Because the California Court of Appeals for the Sixth District's unpublished decision does not raise an important legal question and does not depart from existing uniformity in state law on the subject, there is no basis for review. Indeed, review would be improper because the decision was based on independent and adequate state grounds. For these reasons, the petition for writ of certiorari should be denied.

Dated: December 18, 1991

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